No. 20-

In the Supreme Court of the United States

MARYSUSAN WARD,
Petitioner,

v.

LOUISVILLE METRO GOVERNMENT,
Respondent.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court in *Batson v. Kentucky*, 476 U.S. 79 (1986) held that the Equal Protection Clause of the Constitution's Fourteenth Amendment prohibited litigants in state court criminal trials from using peremptory challenges to exclude jurors based solely on race. However, in addressing how to remediate a violation, this Court expressed:

> "no view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, (citation omitted) or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. (citations omitted)."

Id. at 99-100 n. 24. The questions presented are thus:

(1) Whether the constitutional principles underlying *Batson* require trial courts to craft a meaningful remedy when a violation occurs in order to dissuade the discriminatory use of peremptory challenges such that a trial court may insulate a discriminated juror from the random drawdown requirements of a state procedural rule.

(2) Whether the Constitution's Supremacy Clause, U.S. CONST., art. VI, § 2, prevents a state procedural rule from standing as an obstacle to the constitutional mandate that a trial court craft a meaningful *Batson* remedy.

PARTIES TO THE PROCEEDING

Petitioner is MarySusan Ward. The Petitioner was the Plaintiff-Appellee/Cross-Appellant below.

Respondent is the Louisville Metro Government. The Respondent was the Defendant-Appellant/Cross-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner MarySusan Ward is an individual and thus not a parent corporation or a publicly held company owning 10% or more of another corporation's stock.

RELATED PROCEEDINGS

MarySusan Ward v. Louisville Metro Government, No. 16-CI-000330, Jefferson Circuit Court, Judgment entered on July 23, 2018.

Louisville Metro Government v. MarySusan Ward, Nos. 2018-CA-001276-MR and 2018-CA-001330-MR, Judgment entered on April 10, 2020 and reported at 610 S.W.3d 295 (Ky. App. 2020).

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This petition seeks review of the opinion of the Kentucky Court of Appeals in *Louisville Metro Government v. Ward* (App. 2a – 34a, *infra*), reported at 610 S.W.3d 295 (Ky. App. 2020). The judgment of the Circuit Court of Jefferson County, Kentucky (App. 35a – 36a, *infra*), is not reported. The order of the Kentucky Supreme Court which denied discretionary review of the Court of Appeals opinion (App. 1a, *infra*), is likewise not reported.

JURISDICTION

The opinion of the Kentucky Court of Appeals was entered on April 10, 2020. (App. 2a – 34a, *infra*). A petition for discretionary review in the Kentucky Supreme Court was denied on October 21, 2020 (App. 1a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1257(a) to hear this case by writ of certiorari. This petition is timely filed, as it is filed within 150 days from the date of the Kentucky Supreme Court's order denying discretionary review. Order, 589 U.S. ___ (Mar. 19, 2020).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Supremacy Clause, U.S. Const., Art.VI, Para. 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States,

shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

B. The Equal Protection Clause, U.S. Const. Amend. XIV, § 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*. (Emphasis added).

C. Kentucky Rule of Civil Procedure 47.02: Relevant sections of the Rule are reprinted in the appendix. (App. 37a – 38a, *infra*).

INTRODUCTION

This case requires the Court to revisit *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). At issue is whether the Constitution's Supremacy Clause (U.S. CONST., art VI, para. 2) and the Fourteenth Amendment's Equal Protection Clause (U.S. CONST., amend. XIV, sec. 1) permit a state court procedural rule to impede a trial court from crafting a meaningful remedy to a *Batson* violation in order to deter litigants from prohibited discriminatory uses of peremptory challenges.

This case began as a garden-variety state law employment racial discrimination action in a Kentucky state trial court. This case took on federal constitutional significance because the defending governmental entity, a metropolitan

city's health department, utilized one of its peremptory challenges in an attempt to impermissibly exclude an African-American *venire* member. Succinctly stated, the governmental entity's counsel practiced racial discrimination while defending a racial discrimination case.[1]

The trial judge found a *Batson* violation and fashioned a remedy which mandated that the wrongfully- discriminated *venire* member would participate as one of the twelve jurors who rendered the verdict. The trial judge fashioned this remedy without regard to the Kentucky civil trial rule which requires a random draw-down to eliminate alternate jurors. The trial judge reasoned that subjecting the wrongfully- stricken *venire* member to the draw-down procedure would defeat the purpose of *Batson*.

The Kentucky Court of Appeals held the trial judge abused his discretion in fashioning such *Batson* remedy. The Court held that compliance with the aforementioned procedural rule is mandatory with respect to subjecting all *venire*

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[1] Metro Government's Health Department being accused of racial discrimination is a shocking irony given that Louisville's Mayor recently declared racism to be a "public health crisis". The fact Louisville's Mayor believes some of the city's "systems are more than broken" and need to "be dismantled and replaced" shows a definite need to look inward. The very Metro Government agency charged with promoting public health in Louisville is itself alleged to have engaged in racial discrimination — thus contributing to the very public health crisis it is supposed to solve. *See* https://louisvilleky.gov/news/mayor-outlines-detailed-plan-advancing-racial-equity-black-residents. (accessed March 5, 2021).

members to the potential of random elimination in winnowing out the alternate jurors. As a result, the Court of Appeals reversed a $880,000 verdict rendered by the jury which included the wrongfully- discriminated *venire* member.

STATEMENT OF THE CASE

Petitioner MarySusan Ward (Ward) is an African-American female who was formerly employed by the Respondent Louisville Metro Government's Department of Public Health and Wellness (Metro Government). For approximately eight years, Metro Government employed Ward as an Administrative Assistant.

On January 21, 2016, Ward filed suit against Metro Government in the Circuit Court of Jefferson County, Kentucky, a trial court of general jurisdiction. See KY. CONST, §§ 109, 112(5). Ward's Complaint alleged state law civil rights claims for: (1) violation of her due process rights relating to Metro Government's handling of a purported resignation; (2) race discrimination in violation of KY. REV. STAT. ANN. § 344.040(1)(a);[2]

[2] KY. REV. STAT. ANN. § 344.040(1)(a) provides:

> It is an unlawful practice for an employer:
>
> (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking.

and (3) retaliation in violation of KY. REV. STAT. ANN. § 344.280(1).[3]

Ward's claims proceeded to a jury trial on July 18, 2018. Following *voir dire*, the trial court made any necessary strikes for cause and further reduced the *venire* panel based upon a random draw. This left a sufficient number of *venire* members to seat twelve jurors and two alternates after the parties each exercised their respective four peremptory strikes.

In exercising one of its peremptory strikes, Metro Government chose to eliminate Juror 4879, an African-American male. Ward timely asserted a *Batson* challenge. The trial court and the parties engaged in the colloquy regarding the tripartite *Batson* analysis. The trial court found that Ward made a *prima facie* showing of a *Batson* violation. In response, Metro Government articulated that Juror 4879's status as a union member was the alleged non-discriminatory reason for striking him based upon the presumption that union members are not favorable for employers. Yet, Metro

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[3] KY. REV. STAT. ANN. § 344.280(1) provides:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.
>
> * * *

Government did not exercise any of its other three peremptory challenges against the several white *venire* members who also had a union affiliation. (App. 13a – 14a, *infra*).

The trial court determined that Metro Government's peremptory challenge against Juror 4878 was racially- motivated. The trial court articulated its *Batson* remedy by ordering that Juror 4879 would be seated on the jury but not subjected to the random draw-down of alternates required by KY. R. CIV. P. 47.02 when determining which twelve jurors would deliberate a verdict.[4] The trial court reasoned that "*it would defeat the purpose for which Batson motions are made by eliminating a juror who was placed back*" if that juror could later be randomly eliminated after a finding that Metro Government had engaged in intentional discrimination (emphasis added). (App. 15a, *infra*).

At the conclusion of proof, the trial court granted Metro Government a directed verdict on Ward's due process claim regarding the handling of her resignation. On the remaining claims, however, the twelve jurors returned a unanimous verdict against Metro Government which found that Ward had suffered retaliation in violation of KY. REV. STAT. ANN. § 344.280(1) and awarded her $30,000.00 of lost wages. The jury also

[4] The trial court further added an additional alternate juror and merely advised the *venire* panel that it would be comprised of twelve jurors and three alternates, with the alternates to be determined at the time of submission.

returned a 9-3 verdict[5] which rejected Ward's racial discrimination claim but awarded her the sum of $850,000.00 for mental and emotional distress on her retaliation claim.[6] The trial court entered a judgment upon the jury's verdict on July 23, 2018. (App. 35a – 36a, *infra).*

Louisville Metro timely filed an appeal of the trial court's judgment to the Kentucky Court of Appeals, and Ward timely filed a cross-appeal with respect to the trial court's adverse ruling on an evidentiary issue.[7]

The Kentucky Court of Appeals issued an opinion on April 10, 2020 which affirmed in part and vacated in part the trial court's judgment. In particular, the Court held the trial court did not err in finding that Metro Government committed a *Batson* violation with respect to Juror 4879. The Court of Appeals, however, held the trial court erred in crafting its *Batson* remedy when insulating Juror 4879 from the random selection procedure set forth in KY. R. CIV. P. 47.02. The Court found that subjecting Juror 4879 to the random selection procedure was mandatory. The

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[5] KY. REV. STAT. ANN. § 29A.280(3) requires the agreement of at least three-fourths (3/4) of the jurors in all Kentucky circuit court civil jury trials.

[6] Louisville Metro did not poll the jury following the return of its verdict.

[7] In her Brief to the Kentucky Court of Appeals, Ward asserted that KY. R. CIV. P. 47.02 was unconstitutionally restrictive in that it impinged upon the wide latitude which this Court granted to trial courts when fashioning a *Batson* remedy.

Court accordingly vacated the jury's verdict and remanded the case for a new trial. *Louisville Metro Government v. Ward*, 610 S.W.3d 295 (Ky. App. 2020). (App. 2a – 34a, *infra*).

The Kentucky Supreme Court denied Ward's petition for discretionary review[8] of the Court of Appeals opinion by order entered on October 21, 2020. App. 1a, *infra*).

REASONS FOR GRANTING THE PETITION

This case shows that *Batson* has come full circle. Both *Batson* and this case originated from the same Kentucky circuit court, albeit at different ends of the spectrum. The Court should grant this petition for a writ of certiorari and reverse the opinion of the Kentucky Court of Appeals with respect to the propriety of the trial court's *Batson* remedy.

Dating back as far as *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court has consistently sought to eradicate racial discrimination in the jury selection process. In *Batson*, this Court rightfully expressed its intention to continue a

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[8] Ward presented the following question of law to the Kentucky Supreme Court in her Petition for discretionary review:

> *Batson* and its progeny seek to "eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson,* 476 U.S. at 84. The *Batson* court provided broad latitude to trial courts to secure compliance with the Equal Protection Clause. Does KY. R. CIV. P. 47.02 limit this latitude?

policy of rooting out a systemic history of discrimination in the jury selection process in criminal prosecutions. The Court subsequently extended the prohibition against the use of racially-motivated peremptory challenges to civil cases in *Edmonson, supra.* in furtherance of that policy. The Court has subsequently expanded the prohibition to bar the use of gender-based peremptory challenges. See *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).

A *Batson* violation is a constitutional violation[9] and thus cannot be allowed to stand without the imposition of a meaningful remedy. In this instance, the Kentucky Court of Appeals' rigid fixation with adhering to the random alternate juror draw-down requirements of KY. R. CIV. P. 47.02 stands as an impediment to *Batson's* clear constitutional mandate and must yield.

A. A *Batson* violation commands the crafting of a remedy sufficient to both ameliorate such violation and deter litigants from future violations.

It can be reasonably argued that *Batson*, *supra*, is now so firmly engrained into our jurisprudence that it represents super-precedent on par with cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Erie Railroad v. Tompkins*,

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[9] A *Batson* violation is only one of three ways in which a private party can violate the United States Constitution. The other two are enslaving another human in violation of the Thirteenth Amendment (U.S. CONST., amend. XIII, sec. 1) and bringing alcoholic beverages into a state in violation of its beverage control laws in violation of the Twenty-First Amendment (U.S. CONST., amend. XXI, sec. 2).

304 U.S. 64 (1938) and *Brown v. Board of Education*, 347 U.S. 483 (1954).

The notion that it is acceptable to strike a *venire* member based upon race is so anathema to modern thinking that one can hardly comprehend that such practice was once considered acceptable. It is inconceivable that this Court, or any court, would ever consider retreating from the foundational constitutional proposition upon which *Batson* rests. Viewed through such prism, a *Batson* remedy must be sufficient in depth and breadth to both ameliorate the effects of a violation and deter the improper use of peremptory challenges.

This Court's holding in *Batson* is premised upon the basic principle that jury selection procedures which purposefully exclude African-Americans from service undermine the public confidence in the fairness of our system of justice. 476 U.S. at 87, citing *Ballard v. United States*, 329 U.S. 187, 195 (1946). Potential jurors and litigants thus have a recognized equal protection right to jury selection procedures which are free from state- sponsored group stereotypes rooted in, and reflective of, historical prejudice. *J.E.B., supra.*, 511 U.S. at 128.

It is clear this Court intended that *Batson* was designed to "serve multiple ends." *Powers v. Ohio*, 499 U.S. 400, 406 (1991). *See also Allen v. Hardy*, 478 U.S. 255, 259 (1986). From a broad perspective, this Court intended that *Batson* would remedy the multiple harms which result from the unconstitutional exercise of peremptory

challenges *vis-à-vis* the entire community. 476 U.S. at 86-87.

This Court also intended that *Batson* serve a two-fold granular purpose: protecting both litigants and jurors. In protecting litigants, *Batson* recognizes the:

> "[p]urposeful discrimination in selection of the venire violates a [litigant's] right to equal protection because it denies him the protection that a trial by jury is intended to secure."

476 U.S. at 86. In protecting jurors eliminated because of race, *Batson* concludes that:

> "by denying a person participation in jury service on account of his race, the [party exercising the strike] unconstitutionally discriminate[s] against the excluded juror."

Id. at 87 (citing *Strauder, supra. at* 308).

Given the scope and tenor of this Court's holding in *Batson*, the ultimate issue becomes what consequences must result when a trial court finds a violation. This Court declined in *Batson* to specifically "formulate particular procedures to be followed" in crafting a remedy. 476 U.S. at 99. This Court, however, did articulate two acceptable remedies: (1) discharging the entire *venire* and selecting a new jury from a panel not previously associated with the case or (2) disallowing the discriminatory challenges and resume selection with the improperly- challenged juror reinstated on the *venire*. *Id*. at 99-100 n. 24.

In the latter event, the Court implied the restoration option contemplated the wrongfully excluded jurors will be "reinstated on the venire." 476 U.S. at 99, n. 24. The Court, however, did not address the issue on the granular level of whether reinstating the wrongfully excluded juror would, or could, include insulating such juror from a later random draw-down procedure when eliminating any alternate jurors.

The time is ripe for the Court to review *Batson* as numerous commentators have criticized it for failing to achieve the desired goals. See Section C, *infra*. The Court did not intend that *Batson* be a "toothless tiger" regarding the fashioning of remedies. This is obvious from the Court's statement in *Batson* that its holding "enforce[d] the mandate of equal protection further[ing] the ends of justice." 476 U.S. at 99. While the Court left crafting specific remedies to the discretion of trial courts, it implicitly did not intend to permit a rigid adherence to a state trial procedure to pose an obstacle to *Batson's* constitutional mandate when crafting a remedy. The Court is asked in this case to address the subject issue in order to ensure the constitutional policies it announced in *Batson* are followed.

B. The Kentucky Court of Appeals erred in allowing a state trial rule to function as an obstacle to enforcing *Batson's* constitutional mandate.

In this instance, the Kentucky Court of Appeals ignored both the United States Constitution's Supremacy Clause and the Fourteenth Amendment's Equal Protection Clause by placing

its fixation with the rigid adherence to Kentucky's jury selection procedural rule above this Court's clear constitutional mandate embodied in *Batson*. This state trial rule, KY. R. CIV. P. 47.02, is a clear and direct impediment to giving *Batson* its full effect in the circumstances presented in this case. What happened here is undoubtedly not an isolated incident. It is likely an issue confronted every day in trial courts across the nation. The Court should therefore accept certiorari to address such issue given its high probability of recurrence in future cases.

1. Kentucky jury selection procedures.

Kentucky circuit court petit juries in both civil and criminal cases are generally comprised of twelve jurors.[10] KY. REV. STAT. ANN. § 29A.280(1). The members of these petit juries are selected during *voir dire* from a larger *venire* panel. These venire panels are in turn randomly drawn from the citizens of each particular judicial circuit.[11] *Administrative Procedures for the Kentucky Court of Justice*, Part II, §§ 2, 10. In this instance, the *venire* panel at issue was drawn randomly from among the eligible citizens residing in Louisville-Jefferson County in accordance with the

[10] KY. REV. STAT. ANN. § 29A.280(2) permits litigants in circuit court trials, with court approval, to reduce the required number of jurors to any number less than twelve but not less than six.

[11] In Kentucky, a judicial circuit may be comprised of several counties, as is often the case in rural areas of the state, or a single county as is the case with Louisville-Jefferson County.

Administrative Procedures for the Kentucky Court of Justice.[12]

Once a trial commences in Kentucky's state courts, the specific *venire* panel drawn for a particular case is reduced by the litigants' respective challenges for cause during or following *voir dire*. KY. REV. STAT. ANN. § 29A.290(2). The litigants then exercise their respective peremptory challenges to determine the specific jury panel. *Id*. In Kentucky civil cases, each opposing party is granted three peremptory challenges. KY. R. CIV. P. 47.03(1).

The Kentucky trial procedures also permit the seating of alternate jurors. *Compare* KY. R. CIV. P. 47.02 and KY. R. CRIM. P. 9.32. In Kentucky civil cases, the determination of which particular twelve jurors will deliberate a verdict is not made until the end of the trial. KY. R. CIV. P. 47.02 governs such determination and commands in pertinent part that:

> "If the membership of the jury exceeds the number required by law, immediately before the jury retires to consider its verdict the clerk, in open court, shall place in a box the cards bearing numbers identifying the jurors empaneled to hear the case and, after thoroughly mixing them, withdraw from the box at random a

[12] The Louisville-Jefferson County *venire* panel in this instance was randomly drawn from the county's residents who had: (1) drivers licenses showing a Jefferson County address; (2) filed a Kentucky resident income tax return showing a Jefferson County address; and/or (3) registered to vote in Jefferson County.

> sufficient number of cards (one or two, as the case may be) to reduce the jury to the number required by law, whereupon the jurors so selected for elimination shall be excused."

(See App. 37a, i*nfra*). In this instance, the Court of Appeals held the trial court abused its discretion by insulating Juror 4879 from this draw-down process when fashioning a *Batson* remedy. (See App. 31a – 32a, *infra*).

2. The Kentucky Court of Appeals based its ruling upon a false premise.

The Kentucky Court of Appeals predicated its holding upon the Kentucky Supreme Court's opinion in *Commonwealth v. Doss*, 510 S.W.3d 830 (Ky. 2016). *Doss* held that the right to a completely impartial jury does not entitle parties to a jury of any particular composition. *Id.* at 835. In applying this proposition, the Court of Appeals thus held that the first day of service in which jurors assemble in the jury pool is the only point at which parties are entitled to a fair cross-section of the community. (App. 27a, *infra*, citing *Commonwealth v. Stevens*, 489 S.W.3d 755, 763 (Ky. App. 2016)). The Court of Appeals recognized that *Batson* allows trial courts wide latitude in remedying a violation but reasoned that a trial court must also always strive to maintain impartiality among the jury. (App. 29a, *infra*).

The Court of Appeals' reliance upon *Doss* is misplaced and missed the point of *Batson*. In *Doss*, the same trial judge which presided over this case discharged a jury panel initially selected to decide

a criminal case against an African-American defendant because of its lack of racial diversity (1 of 41 *venire* members were African-American).[13] The trial court then proceeded with the trial only after empaneling a second, more racially- diverse, *venire* panel.[14] The Kentucky Supreme Court was highly critical of the trial court's action because it was not based upon statistical or demographic evidence which supported the proposition that the initial *venire* panel was the result of anything other than a random occurrence.

Doss, however, did not involve the act of a trial judge either finding or remedying a *Batson* violation. Ward wholeheartedly agrees with the principal that litigants are only entitled to a *venire* panel drawn from a cross- section of the community as of the first day of jury service. *Doss*, however, neither considered nor addressed any of the elements of *Batson*. Not surprisingly, *Doss* also neither considered nor addressed the fact that *Batson* was intended to readjust this calculus when it becomes necessary to remedy intentional discrimination which occurs during the jury selection process. This Court specifically said in *Batson* that trial courts can reinstate a wrongfully-stricken juror. *Doss*, therefore, cannot be read to contradict that proposition. The Court of Appeals'

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[13] The United States Census Bureau estimates the African-American population of Louisville-Jefferson County, Kentucky is 23.5%.
See https://www.census.gov/quickfacts/louisvillejefferson countybalancekentucky. (Accessed March 5, 2021).

[14] The second, more racially- diverse jury, acquitted the defendant in *Doss*.

reliance upon *Doss* was erroneous because it compared apples to oranges as the two cases involve completely different sets of analysis, inquiries and remedies.

3. The Kentucky Court of Appeals' holding erodes the constitutional gravity of a *Batson* violation.

In this instance, the Kentucky Court of Appeals' rigid insistence on adhering to procedure severely erodes the constitutional gravity of a *Batson* violation. It cannot be forgotten that a litigant violates the United States Constitution when committing a *Batson* violation.

Here, the tenor of the Court of Appeals' opinion essentially incentivizes the deployment of racially-motivated peremptory challenges instead of standing firm against such practice. As this case evidences, subjecting Juror 4879 to the random draw-down procedure mandated by KY. R. CIV. P. 47.02 would completely erode the constitutional gravity of Metro Government's *Batson* violation and, as argued *infra.*, eliminate any deterrence against future violations.

The Court of Appeals emphasized its belief that a trial court "must always strive to maintain impartiality among the jury" when fashioning a *Batson* remedy. (App. 29, *infra*). Ward agrees, but that sword cuts both ways. In this instance, Metro Government sought to empanel a jury which it believed would be anything but impartial when choosing to strike Juror 4879. Metro Government crystalized this point by scrambling to gin up additional non- discriminatory grounds after the

trial court found a *Batson* violation. (See App. 14a – 15a, *infra*).

Fifteen jurors heard the evidence in this case. The mandatory draw-down of three jurors required by KY. R. CIV. P. 47.02 meant a 6.7 percent probability that any particular juror would be eliminated on the first draw, a 7.14 percent probability of elimination on the second draw and a 7.7 percent probability of elimination on the third draw. Metro Government thus sought to adjust those odds to a 100% probability of elimination when choosing to exercise a racially-motivated peremptory challenge against Juror 4879. All the trial court did in this instance was simply negate Metro Government's attempt to rig the odds by readjusting Juror 4879's elimination risk to 0%.

A litigant in Metro Government's position who violates *Batson* "must cope with losing his race-based gamble." *Peetz v. State*, 180 S.W.3d 755, 761 (Tex. Ct. App. 2005). It was thus error for the Court of Appeals to relieve Metro Government of the risk and burden of its race- based gamble. Just as Las Vegas casinos do not allow players to get a re-do when they make ill-advised bets and then predictably lose, the Court of Appeals should have not allowed Metro Government to essentially do the same in this instance.

The Court of Appeals' holding sends a clear and resounding message to both litigants and their counsel — the employment of racially- motivated peremptory challenges allow parties to deploy a racially- motivated peremptory challenge and thus

obtain the desired result sought by the improper conduct if the juror targeted by such challenge is eliminated during the random drawdown process.

In football terms, this is analogous to a team having the ball on its own 1-yard line and committing a grievous penalty but only being penalized half the distance to the goal. The Court of Appeals validated this analogy at footnote 7 of its opinion through the statement that Metro Government forfeiting its peremptory challenge and Juror 4879 being placed back onto the jury panel was "in and of itself, a method of penalizing an impermissible use of peremptory challenges." App., *infra*, at 30a. Such statement stands in stark contrast to what the Court of Appeals said in the prior paragraph of its opinion that ensuring Juror 4879 a seat on the jury would have been appropriate had there been no alternate jurors. *Id*. The fact that parties choose to seat alternate jurors should not change the scope of a trial court's available *Batson* remedies.

Nothing in this Court's *Batson* opinion suggests that a trial court simply re-seating a wrongfully-stricken juror subject to a subsequent draw-down was the outer limits of its authority. Blind adherence to a procedural rule in the face of a clear constitutional violation cannot be countenanced and cannot be accepted as the norm in the jury selection process.

The erosion of a *Batson* violation's gravity is further amplified by two circumstances apparent in this case: the violation it occurred at the hands of a government entity litigant, and it occurred

during the defense of a race discrimination case. A trial court need not consider *Batson* issues in a vacuum. A trial court thus certainly acts within its discretion when considering the salient factors and circumstances of a particular *Batson* violation when discerning how to fashion an appropriate remedy.

Dare say this is not the only occasion in which Metro Government has either been sued and faced a jury. Dare say Metro Government will be sued again in the future. Metro Louisville has a 23.5% African-American population. Regrettably, the Court of Appeals' holding gives litigants like Metro Government *carte blanche* to ignore *Batson* in future cases, discriminate against nearly a quarter of Louisville's population when selecting juries, and render trial courts essentially powerless to craft a meaningful remedy.[15] This result is surely not what this Court intended in *Batson*.

4. The Kentucky Court of Appeals' holding is at odds with the results reached in other states.

The holding of the Kentucky Court of Appeals is constitutionally- incongruent when compared to the manner in which other state courts have addressed the subject issue. Kentucky's insistence on a rigid adherence to KY. R. CIV. P. 47.02 stands

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[15] A denial of certiorari will result in a retrial of Ward's discrimination claims against Metro Government. Yet, the holding of the Court of Appeals will allow Metro Government to again engage in the same type of discriminatory uses of its peremptory challenges and emasculate the trial court from remedying such a violation of *Batson*.

in stark contrast. For instance, New York's courts have countenanced the actual removal of a seated juror to guarantee the placement of a *venire* member who was wrongfully subjected to a racially- motivated peremptory challenge. *People v. Frye*, 191 A.D.2d 581, 581-82, 595 N.Y.S.2d 84, 84-85 (2d Dep't 1993). The policy of allowing this displacement is intended to effectuate the purposes of *Batson* which could:

> "require removing from the panel jurors who had been selected before the Batson-Kern challenge was sustained. While one might consider this to be unfair, it would nevertheless be consistent with the underlying principle embodied by both Batson . . ., to prevent discrimination in the selection of a jury...."

People v. Moten, 159 Misc.2d 269, 281, 603 N.Y.S.2d 940, 947 (N.Y.Sup.1993). Importantly, *Moten* recognized that not seating a wrongfully-stricken juror would reward the very conduct which *Batson* was intended to prevent. *Id*. The courts in both *Caston v. Costello*, 74 F.Supp.2d 262 (E.D.N.Y. 1999) and *People v. Rivera*, 307 Ill.App.3d 821, 719 N.E.2d 154 (Ill. App. 1999) recognized these principles.

Courts in Georgia have reached a similar result. In *Holmes v. State*, 273 Ga. 644, 543 S.E.2d 688 (Ga. 2001), the Georgia Supreme Court addressed a reverse *Batson* situation (defense counsel's racially- motivated use of a peremptory challenge). The trial court in *Holmes* "reinstated the juror and made an alternate of the previously

chosen twelfth juror." *Id*. at 690. The Georgia court justified this remedy on the basis that "the trial court had the constitutional power to seat an individual juror determined to have been challenged in violation of Batson." *Id*.

In *Jones v. State*, 343 Md. 584, 683 A.2d 520, 529 (Md. 1996), the Maryland Supreme Court addressed another reverse *Batson* case involving a defense's multiple racially- motivated peremptory challenges. The Maryland trial court did not adjudicate the *Batson* violations until after the jurors and alternates had been seated. As a remedy, the trial court reconfigured the jury panel by seating each of the five impermissibly stricken jurors.[16] The Maryland Supreme Court recognized that a *Batson* violation implicates the rights of both the affected party and juror(s) and thus any remedy must "take account of and, to the extent possible, vindicate each." 683 A.2d at 525. The court focused on the importance of the remedy balancing the rights of potential jurors not to be excluded from jury service by unconstitutional means against the potential prejudice to the litigants. *Id*. at 528. *Jones* makes no mention of considering the adherence to state procedural rules as a factor to be considered.

Ultimately, *Jones* concluded that the need to consider conflicting constitutional rights of the parties and the excluded juror militates in favor of permitting trial courts the latitude to tailor a

[16] The jury selection procedure followed in Maryland appears to specifically identify which *venire* members are designated as jurors and alternatives. MD. RULES §2-512.

remedy so as to protect the rights of all the parties concerned. 683 A.2d at 529. As such, a *Batson* colloquy which occurs outside the presence of the jurors, including the excluded juror, reduces the likelihood of prejudice to the litigants.[17] *Id*. Under the circumstances, the Maryland Supreme Court held the trial court did not abuse its discretion in seating the improperly excluded jurors.

Finally, the Missouri Supreme Court reached a similar result in *State v. Grim*, 854 S.W.2d 403 (Mo. 1993). In *Grim*, the court addressed the proper remedy to cure a *Batson* violation in holding that the proper remedy for discriminatory use of peremptory strikes is to:

> "quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would."

854 S.W.2d at 416. *Grim* is relevant here because it resulted in the improperly- stricken *venire* member being given a guaranteed position on the jury. The result in *Grim* is not meaningfully different than the remedy fashioned by the trial court in this case.[18]

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[17] The *Batson* colloquy in this case, like the one in *Jones, supra*, occurred outside the presence of the jury, including any improperly- stricken juror.

[18] Unlike Kentucky's jury selection procedure, alternate jurors in Missouri are selected, seated, and specifically identified distinctly from the regular jurors. MO. REV. STAT. § 495.485. Thus, the placement of a wrongfully- stricken *venire* member on a Missouri jury is functionally no different than exempting a wrongfully- stricken juror from an alternative juror random draw-down procedure.

What the Kentucky Court of Appeals failed to appreciate in this instance is that sometimes simply placing a wrongfully excluded juror back in the place he or she would have occupied absent a wrongful exclusion does not truly vindicate a *Batson* violation. Certainly, vindicating such a violation must be a trial court's first consideration when fashioning a remedy. But what about deterring litigants and their counsel from violating *Batson* in the future? Commentators recognize that "*Batson's* force, if any, will lie in the deterrent effect it will have upon prosecutors." Wilson, *Batson v. Kentucky: Can the 'New' Peremptory Challenge Survive the Resurrection of Strauder v. West Virginia?*, 20 Akron L.Rev. 355, 364 (1986).

The trial court here fashioned a remedy which it calculated would give teeth to *Batson*. The trial court recognized that "it would defeat the purpose for which *Batson* motions are made by eliminating a juror who was placed back" if Juror 4879 could later be randomly eliminated after a finding of intentional discrimination. (App. 14a – 15a, *infra*). The trial court's expressed purpose and its remedy fulfilled *Batson's* constitutional mandate. Such purpose and remedy were in line with that employed in other states which have given *Batson* due credence.

5. The Kentucky Court of Appeals' holding cannot survive policy scrutiny.

Among the things for which 2020 will forever be remembered, issues of race were thrust into the national consciousness in a way not seen since the 1960's. Many segments of American society believe

the law enforcement and judicial institutions are laden with systemic racism. Many Americans thus have little, or no, confidence in the fairness and integrity of either institution. Yet, the existence of systemic racism in the jury selection process was something *Batson* was supposed to remedy - - 35 years ago.

Commentators and pundits will long debate the veracity of the aforementioned public perceptions. For many of our fellow citizens, those perceptions are reality. It is easy to comprehend this lack of confidence when viewing the issue from the perspective of an African-American litigant or prospective juror. The Court of Appeals tacitly sent the message that members of the Commonwealth's African-American community enter the judicial system at their own peril and that their participation in jury service is not desired. When viewed through the prism of today's racial consciousness, the Court of Appeals' holding simply cannot survive the most basic level of policy scrutiny.

This Court noted in *Batson* that the racially-motivated uses of peremptory challenges both touch the entire community and undermine public confidence in the fairness of our system of justice. 476 U.S. at 87. It is, and should be, troubling that a large segment of our population does not believe the judicial system treats them fairly from stem to stern. The overarching policy of the judiciary should be to ensure the existence of public confidence in the institution. Doing so in the present environment requires this Court to resoundingly proclaim that trial courts must be

accorded the flexibility and discretion to fashion remedies which serve a strong dissuasive purpose. This must be true even if such remedies step on some toes or disregard sacred cows. The trial court understood this fact and appropriately fashioned a *Batson* remedy.

Ensuring the deterrent effect of a *Batson* remedy is something numerous state courts have recognized and upheld by employing varied solutions. See *e.g. People v. Luciano*, 860 N.Y.S.2d 452, 10 N.Y.3d 499, 505 (N.Y. 2008) [Forfeiture of peremptory challenges to further the deterrence of discriminatory conduct]; *United States v. Walker*, 490 F.3d 1282, 1294-95, 1295 n.14 (11th Cir. 2007) [reinstating four improperly stricken jurors and declining to replace "lost" challenges]; *People v. Perez*, 37 A.D.3d 152, 829 N.Y.S.2d 61, 64 (App.Div.2007) [granting additional peremptory challenges to the party against whom the peremptory challenges have been misused]; *Commonwealth v. Hill*, 1999 PA Super. 48, 727 A.2d 578 (Pa.Super.Ct.), appeal den., 747 A.2d 898, 747 A.2d 898 (1999) [same]; *People v. Willis*, 27 Cal.4th 811, 118 Cal.Rptr.2d 301, 43 P.3d 130, 137 (Cal. 2002) [imposition of a monetary sanction];[19] and *Minniefield v. State*, 539 N.E.2d

[19] A *Batson* violation committed by a state or local governmental party like Metro Government would surely constitute a deprivation of a constitutional right under the color of state law or custom. Accordingly, Ward premises that a litigant subjected to a *Batson* violation at the hands of a state or local government actor would also have a cause of action arising under 42 U.S.C § 1983 to remedy that violation. In this instance, Ward could certainly make the case that Metro Government's constitutional violation has

464, 466 (Ind. 1989) [declaration of a mistrial]. The remedy imposed by the trial court was not beyond the bounds of these remedies.

A *Batson* violation is an unconstitutional act and the penalty must be commensurate with the gravity of the violation. Trial courts are in the best position to judge such gravity in real time. Thus, the trial court here was right to consider that Metro Government violated *Batson* and then tried to gin up additional non-discriminatory reasons after being caught. The trial court would also have been justified in considering that the violation occurred at the hands of a government entity in defending a racial discrimination case.

This Court did not contemplate in *Batson* that trial courts were to be hamstrung by state trial procedures when remedying a violation. Part and parcel of the policies underlying *Batson* is deterring litigants and counsel from employing racially- discriminatory uses of their peremptory challenges. The deterrent effect of a remedy is necessary if *Batson* is to be given its intended effect. The remedy should "signal[] to litigants -- and to the jury -- that discrimination will not be tolerated." *Luciano, supra*. 10 N.Y.3d at 505. That remedy statement parallels the intention of the *Batson* remedy fashioned by the trial judge in this instance. It is the same remedy statement to which Ward is asking this Court to give its imprimatur.

However, the Court of Appeals' holding places its demand to rigidly adhere to procedure above

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exacerbated the mental anguish which a jury has already recognized.

the constitutional rights of both litigants and excluded jurors. It also places a demand on the rigid adherence to procedure above the policy of deterring violations of those rights. As a matter of constitutional mandate, normal trial procedures used for selecting and seating jurors must yield in the face of a *Batson* violation.

This Court rooted its holding in *Batson* upon the Fourteenth Amendment's Equal Protection Clause. 476 U.S. at 88. Yet this case demonstrates another Equal Protection question - - that being the availability to fully remediate a *Batson* violation depends upon locality. The above-cited cases demonstrate that trial courts in New York, Georgia, Maryland or Missouri can permissibly vindicate a *Batson* violation by assuring a jury seat to a jury against whom a peremptory challenge was impermissibly used. Yet, the import of the Court of Appeals' opinion means that Kentucky trial judges do not possess such authority on par with their counterparts elsewhere. The concept of Equal Protection dictates that litigants and potential jurors should be treated the same no matter their locality. Kentucky trial judges must be accorded the same latitude as trial judges in states like New York, Georgia, Maryland and Missouri.

It does not strain reasonableness that a trial court can permissibly insulate a wrongfully-discriminated juror from a later draw-down process when eliminating any alternate jurors. The ultimate relief which Ward asks the Court to dispense is thus narrow and limited to the precise situation presented by this case. The Court is not

asked to revisit or amend its *Batson* test. The Court is simply asked to address one element of the remedies which it previously countenanced in *Batson* regarding the re-seating of a juror against whom a racially- motivated peremptory challenge was used.

If *Batson* is to be given its full effect and remain a relevant element of American jurisprudence, trial courts must be empowered to craft meaningful remedies. They must be empowered to craft remedies which deter parties and counsel from employing racially- motivated exercises of peremptory challenges. Again, this case brings *Batson* full circle. It is quite disconcerting that a discussion about how to satisfactorily remedy the racially- motivated use of peremptory challenges is even necessary nearly 35 years after *Batson*.

C. The academic and judicial criticisms of *Batson* demonstrate the necessity of the Court focusing on ensuring that remedies have a deterrent effect on litigants who might consider the racially- motivated use of peremptory challenges.

This case further presents an opportunity for the Court to address the various criticisms leveled as to the efficacy of *Batson*. Both academic and judicial commentators have widely criticized *Batson* as being ineffective because of its failure to curb the use of racially- motivated peremptory challenges.[20] Some commentators have even

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[20] *See, e.g.*, *Alafair S. Burke, Prosecutors and Peremptories,* 97 Iowa L. Rev. 1467, 1469 (2012); *Leonard L. Cavise, The Batson Doctrine: The Supreme Court's Utter*

opined that the problem of racially- motivated peremptory challenges is as pervasive now as in 1986.[21] A 2018 Columbia Law Review article recognized *Batson's* shortcomings, particularly the inability to prevent and remedy violations in real time.[22] In response to these criticisms, some commentators have, in fact, called on this Court to

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Failure to Meet the Challenge of Discrimination in Jury Selection, 1999 Wis. L. Rev. 501, 501; *Charles J. Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges,* 31 Am. Crim. L. Rev. 1099, 1105 (1994); *Camille A. Nelson, Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy,* 93 Iowa L. Rev. 1687, 1689 (2008); *Ulysses Gene Thibodeaux, The Changing Face of Jury Selection: Batson and Its Practical Implications,* 56 La. B.J. 408, 409 (2009); *Joshua Revesz, Comment, Ideological Imbalance and the Peremptory Challenge,* 125 Yale L.J. 2535, 2535 (2016); *Kenneth J. Melilli, Batson in Practice: What We Have Learned About Batson and Peremptory Challenges,* 71 Notre Dame L. Rev. 447, 503 (1996); *William T. Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient,* 1987 Sup. Ct. Rev. 97, 134); *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion,* 119 Harv. L. Rev. 2121, 2134 (2006); *Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky: A Promise Unfulfilled,* 58 UMKC L. Rev. 361, 369 (1990).

[21] *See, e.g., Miller-El v. Dretke,* 545 U.S. 231, 270 (2005) (Breyer, J., concurring) ("On the other hand, the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.").

[22] Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, Columbia Law Review, Vol. 118, No. 3, 713 (May 1, 2018).

outright ban the use of peremptory challenges when selecting juries.[23]

These criticisms of *Batson's* overall efficacy are each fairly leveled. Ward, however, does not stand with those commentators who might propose a wholesale prohibition of peremptory challenges. Ward believes that peremptory challenges serve a legitimate purpose and are a useful part of the litigation process. Instead, Ward sees this case as an opportunity for the Court to approach *Batson's* shortcomings by strengthening the ability of trial courts to fashion remedies. Part and parcel of achieving such goal requires that *Batson* violations determined in real time must be also remedied in real time in a manner which fosters strong deterrence. There is no stronger deterrence than litigants mutually knowing that discriminating against a juror based upon his or her race could result in that juror ultimately deciding their case.

Unlike other constitutional violations, this Court's opinion in *Batson* failed to prescribe a specific and definitive remedy.[24] Instead, the Court in *Batson* left trial courts to bear the burden of fashioning remedies. The Court, however,

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[23] Abel, *supra.*

[24] For instance, this Court has specifically prescribed the remedy in addressing other constitutional violations. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) [applying exclusionary rule to Fourth Amendment violations]; *Miranda v. Arizona*, 384 U.S. 436 (1966) [applying exclusionary rule to Fifth Amended violations]; *Massiah v. United States,* 377 U.S. 201 (1964) [applying exclusionary rule to Sixth Amendment violations].

suggested two specific acceptable remedies, including reinstating an improperly challenged juror to the *venire* panel. 476 U.S. at 99-100 n. 24. Ward hypothesizes this particular portion of the *Batson* opinion was a compromise forged among the Justices to ensure sufficient majority support for the underlying constitutional policy. The trial court here acted consistent with *Batson* and the Court of Appeals erred in finding otherwise. The time has come for the Court to definitely ensure that judges, attorneys and litigants unmistakably understand that violating *Batson* will come at a heavy price.

Batson rests upon a firm constitutional foundation and any remedy to a violation rests upon an equally firm constitutional footing. The Constitution's Supremacy Clause and the Fourteenth Amendment's Equal Protection Clause must therefore be held to collectively preclude any obstacle to effecting its constitutional mandate. This specifically includes impediments like those found in state trial procedures such as KY. R. CIV. P. 47.02. The trial court here understood the purpose of *Batson* and accordingly sought to fulfill its constitutional mandate. The trial court adopted a constitutionally- permissible remedy by which it intended to send a deterrent message. This Court should heartily embrace that deterrent message and repudiate the opposite message sent by the Court of Appeals' opinion.

If the aforementioned academic and judicial commentators correctly premise that *Batson* has failed to effectively eradicate racially- motivated uses of peremptory challenges, it is thus

incumbent upon the Court to focus on the efficacy of remedies which both dissuade and deter such violations. This Court should send a strong message that violating *Batson* will come at a high price - - a price which might very well include owning any juror against whom the litigant unsuccessfully used a racially- motivated peremptory challenge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Kentucky Court of Appeals should be granted.

Respectfully submitted,

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March 2021

APPENDIX A
Order of Kentucky Supreme Court Denying Review
[Filed October 21, 2020]

Supreme Court of Kentucky

2020-SC-0246-D
(NO. 2018-CA-001276-MR
AND
NO. 2018-CA-001330-MR)

MARYSUSAN WARD MOVANT

JEFFERSON CIRCUIT COURT
v. 16-CI-000330

LOUISVILLE METRO GOVERNMENT RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Entered: October 21, 2020.

John D. Minton, Jr.
Chief Justice

APPENDIX B
Opinion of the Kentucky Court of Appeals
[Filed April 10, 2020]

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001276-MR
AND
NO. 2018-CA-001330-MR

LOUISVILLE METRO GOVERNMENT

APPELLANT/CROSS-APPELLEE

v.

MARYSUSAN WARD

APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM
JEFFERSON CIRCUIT COURT HONORABLE
OLU A. STEVENS, JUDGE
ACTION NO. 16-CI-000330

BRIEFS FOR APPELLANT/CROSS-APPELLEE: Patricia C. Le Meur Louisville, Kentucky J. Denis Ogburn Jefferson County Attorney's Office Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT: Robyn Smith Louisville, Kentucky

AMICUS CURIAE BRIEF FOR BRANDEIS SCHOOL OF LAW BLACK LAW STUDENTS ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY: John S. Friend Louisville, Kentucky Samuel A. Marcosson Pro Hac Vice Louisville, Kentucky

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

OPINION

JONES, JUDGE:

Appellee/cross-appellant, MarySusan Ward, initiated the underlying action in Jefferson Circuit Court against Louisville-Jefferson County Metro Government ("Louisville Metro") after she was separated from her employment following a contentious counseling meeting with her manager. Ward sought damages for a violation of her due process rights,[1] pay-related racial discrimination, and retaliation. During trial, Ward challenged two of Louisville Metro's peremptory jury strikes as being racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court sustained one of the two *Batson* challenges.

As a remedy for this violation, the trial court placed the juror back on the panel. A fifteen-member panel, which included the subject juror, heard the

[1] The trial court granted Louisville Metro's motion for a directed verdict in its favor with respect to Ward's due process claim. That claim is not part of the instant appeals.

case. Prior to selecting the final twelve deliberating jurors, a discussion arose regarding what to do about the *Batson* juror. Ultimately, the trial court told the parties that the subject juror would automatically be part of the deliberating jury and directed the deputy clerk to remove that juror's name from the drawdown pool. The deliberating jury, which included the subject juror, returned a verdict in favor of Louisville Metro on Ward's pay discrimination claim, but found in Ward's favor on the retaliation claim for which it awarded her a total of $880, 030.80 in damages.[2]

On appeal, Louisville Metro asserts the trial court committed reversible error in: (1) failing to enter a directed verdict on the retaliation and discrimination claims; (2) sustaining the *Batson* challenge; and (3) subsequently insulating the subject juror from the drawdown process. Ward filed a conditional cross-appeal arguing that in the event this Court vacates the jury's verdict, on retrial the trial court should be directed to allow evidence regarding Louisville Metro's resignation policy for the purpose of showing that Ward's purported resignation was not effective.

Following a careful review of the record and applicable law, we affirm the trial court's denial of Louisville Metro's motion for a directed verdict on the retaliation and discrimination claims as there was sufficient evidence presented to allow the jury to decide these claims; we likewise affirm the trial court's decision to sustain the *Batson* challenge

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[2] The jury awarded $30, 030.80 in lost wages and $850, 000.00 for embarrassment, humiliation, and mental and emotional distress.

insomuch as there was some evidence that the proffered reasons for the strike were pretextual and that the strike was racially motivated. However, we hold that the trial court committed reversible error when it insulated the subject juror from the drawdown process. *Batson* is designed to ensure that jurors are not unfairly discriminated against. In this case, the trial court's remedy went too far; instead of allowing the subject juror to be treated equally in terms of ability to serve, the remedy removed the element of fairness that a random draw affords. Because the verdict was rendered by a unfairly selected jury, we must vacate it in its entirety and remand for a new trial at which Ward should be permitted to introduce evidence related to the resignation policies of Louisville Metro.

I. Background

MarySusan Ward, an African-American female, worked in Louisville Metro's Department of Public Health and Wellness for approximately eight years, beginning in 2007, when she was hired as an Administrative Assistant. In November 2011, Tammy Anderson, a Caucasian female, was appointed as the Assistant Director of that department. Anderson became Ward's direct supervisor. Prior to November 2011, Ward received generally good reviews, including positive recognition when she successfully addressed constructive criticism regarding her customer service skills.

Ward's performance reviews remained consistent in the years following, although the only raises Ward received were annual costs of living wage increases to her salary. Eventually, with Anderson's support,

Ward was promoted to an Administrative Specialist position, which was accompanied by a pay increase. Throughout the course of their working relationship, Anderson accommodated Ward's requests to work alternative hours and to use a temporarily vacant executive assistant office instead of her desk in the reception area. Anderson attempted to resolve interoffice relationship issues as they arose, although they were not always addressed to Ward's satisfaction. Ward reportedly clashed with some of her coworkers, including two women (one African-American and one Caucasian) who successively held the Executive Assistant position in her department.

On September 30, 2015, Ward filed a complaint with Louisville Metro's Human Resources Compliance Division alleging race discrimination in the form of wage disparity and unspecified retaliation by Anderson.[3] Ward and another African-American Louisville Metro employee, Robyn Dickerson, had researched public pay records during the 2014-2016 time period and discovered that several Caucasian Louisville Metro employees had received raises and promotions. Dickerson and Ward alleged that Caucasian employees were given raises that exceeded those normally permitted by Louisville Metro's policies and that supervisors, like Anderson, advocated for raises for Caucasian employees but did not do the same for similarly situated African-American employees.

Under Louisville Metro's policy, some managers, like Anderson, have the discretion to advocate - or

[3] Ward would later supplement this complaint to allege that a counseling mandated by Anderson was retaliation.

refuse to advocate - for employees in extraordinary wage decisions.[4] Promotions, reclassifications, and their accompanying pay raises are premised on a variety of factors including education, experience, and seniority. Dickerson, a Community Heath Supervisor, belonged to a separate federally-funded division from Ward's in which supervisors lacked the flexibility regarding salaries and other budgetary matters compared with other divisions.

After their review of fellow Louisville Metro employees' salaries, Ward and Dickerson came to believe that they were being discriminatorily passed over for raises in favor of Caucasian employees. Dickerson claimed that, during the 2014-2016 period, some of Louisville Metro's Caucasian workers were receiving increases of 10-21% within a single year, despite Louisville Metro policies limiting pay increases to 10%. Dickerson herself began taking on additional duties within her department in 2015, although an internal job audit determined that her work increase did not merit a pay raise.

Ward's wage-discrimination complaint was premised primarily upon the fact that the new Executive Assistant, Linda Gillock, had received a large pay increase during the first months of her probationary period with Anderson's aid. Gillock, a Caucasian female, was newly appointed to an Executive Assistant position with different job duties and minimum requirements than Ward's Administrative Assistant position. Anderson advocated for Gillock's 10% raise, leading Ward to

[4] Louisville Metro classifies pay increases over 10% as extraordinary.

suspect that Anderson was advocating for Gillock in a way that she had not done for Ward. According to Louisville Metro, Gillock's raise was merited due to her low starting salary, her significant relevant experience in the Mayor's office, and a salary comparison against similarly situated Louisville Metro employees. The resulting raise put her in the same salary range as Gillock's predecessor, who was African-American.

The Human Resources Compliance Division ultimately determined that Ward's original claims of pay disparity, race discrimination, and retaliation were unsubstantiated. The parties dispute whether Anderson was aware at the time that Ward had filed a discrimination complaint against her, although it was around that time that Anderson began to take more scrutinizing notes regarding Ward's job performance.

Late that same September, Anderson was alerted that Ward's name had appeared on an automatically generated list produced by Louisville Metro's Office of Performance Improvement, identifying Ward as an employee who demonstrated a high use of sick leave. According to Louisville Metro's policy, "high" use of sick leave is defined as nine unexcused absences and/or six "occurrences," and necessitates a formal counseling session. Under Louisville Metro policy, counseling is designed to notify an employee of minor issues that need correcting, such as attendance. The supervisor of such an employee is required to conduct a formal meeting to discuss the issue with the employee and outline steps to correct the issue. At trial, the parties disputed whether counseling was a punitive measure. While

counseling itself does not entail any loss of benefits, decrease of pay, demotion, or other change in working conditions, Ward noted that counseling is a first step toward more serious discipline.

Upon receipt of Louisville Metro's list, Anderson advised Ward that she would be required to participate in counseling as a result of her inclusion on the list. When Anderson asked Ward to provide doctors' notes for her missing days to decrease her number of unexcused absences, Ward provided notes for only some of the missed days and was again included on the October 2015 sick leave report. Despite this, Ward rebuffed Anderson's initial attempt to provide counseling, contesting the report and refusing to discuss attendance. She later agreed to meet after Anderson reviewed the data again.

That following week, on October 27, 2015, Anderson conducted Ward's counseling regarding her use of sick leave. Anderson asked Katherine Turner, the division's Communications Director, to attend Ward's counseling as an objective third party. Turner suggested recording the counseling, which she testified she did commonly to create an accurate record of meetings. Although she did not record most employee interactions, Anderson agreed. Although neither Anderson nor Turner informed Ward that the session was being recorded, Turner made no attempt to conceal the phone or her active recording.

Anderson began the meeting by reviewing with Ward the documentation of her sick leave use and doctors' notes, explaining how she counted the absences and answering Ward's questions. Anderson also provided Ward with a written record of the counseling, which outlined Ward's attendance

issues, identified applicable Louisville Metro policies, and listed corrective actions Ward could take to avoid progressive disciplinary action. The subject of the meeting then drifted as tensions rose, and Ward began to bring up issues that she had with departmental discipline, criticizing both her fellow employees and Anderson's leadership. When Ward asked for a restroom break, Anderson instructed her to come "right back." Anderson testified that she wanted Ward to come back so that so she could pay Ward a compliment and keep the meeting from ending on a bad note.

Upon Ward's return, tensions did not abate, and the conversation veered in "a whole different direction" with "one thing [leading] to another" after Ward refused to accept Anderson's compliments. Video Record ("VR") 7.11.18 4:14:10-4:15:20. Anderson deviated from the original counseling topic into other, unrelated criticism, which Ward rejected or disputed, providing her own criticisms of Anderson and their other coworkers. As the conversation wore on, Anderson informed Ward that "the whole department is complaining about you" and that Ward "never [took] responsibility" for her actions because she "thought [she] was above policy." VR 7.11.18 4:42:10-4:43:39; VR 7.11.18 4:43:52-4:44:20. At several points in the conversation, Anderson involved Turner to reiterate her criticisms.

Rather abruptly, Ward announced, "I think that I've made my decision. I'm going to go ahead and resign at this point." VR 7.12.18 4:08:53-58. Anderson asked if Ward wanted some time to think about her decision, which Ward declined, and

Anderson accepted her verbal resignation. Ward then left the room, took her break, and worked the rest of the day without incident. She then called Human Resources, who told Ward that an official resignation needed to be in writing to be effective and that she did not have to follow through on her verbal resignation if she had changed her mind or wanted to await the outcome of the then-pending investigation into Ward's discrimination complaint.

Ward testified that after speaking with Human Resources, she changed her mind about resigning and decided not to follow through with the process. She reported to work as usual the next morning. Upon arriving at her work station, Ward discovered that she was not able to log into her work computer. Anderson then met with Ward. Anderson told Ward that she had resigned and that she no longer worked at Louisville Metro. In response, Ward told Anderson that she had not resigned because she had not completed the written process. When Anderson pressed, Ward eventually said that she had come in with the intention of submitting her two-week notice. Anderson did not back down. She maintained that Ward's verbal resignation was effective, that Ward did not have the option of revoking the resignation, and that Ward was no longer employed at Louisville Metro as of the prior day, making it unnecessary for her to give a two-week notice. Anderson then asked another Louisville Metro worker, a "big" man, to escort Ward from the building. VR 7.11.18 5:03:15-5:10:51. Ward called Human Resources and reported that Anderson was retaliating against her for her discrimination complaint and that she did not want to resign.

That same day, Ward authorized her attorney to transmit a letter to the Interim Director of the Health Department explaining that she had not resigned but had instead been prevented from working, which the Interim Director handed off to Anderson. There is no evidence that the accusations of retaliation contained in Ward's letter were ever investigated by anyone at Louisville Metro. Ward was met with silence once again when her attorney sent a letter to the Director of Human Resources to begin the grievance process. That process applies in situations of involuntary termination not resignation.

Ultimately, Ward filed suit against Louisville Metro on January 21, 2016, asserting three claims: (1) violation of due process for not allowing Ward to revoke her resignation; (2) race discrimination; and (3) retaliation. Trial began as scheduled on July 10, 2018.

The parties completed voir dire and jury selection on the first day of trial. The trial court made its random strikes first, and thirteen panel members were excused by random draw, leaving a sufficient number to seat twelve jurors and two alternates after the parties each exercised their four peremptory strikes. In exercising its peremptory strikes, Louisville Metro eliminated Jurors 4879 and 4206. Ward challenged Louisville Metro's elimination of these two jurors under *Batson*, as both jurors were African-American and comprised two of only three African-American individuals remaining on the jury after preliminary strikes.

At the court's request, Louisville Metro provided the reasoning behind its peremptory strikes.

According to Louisville Metro, Juror 4206 was likely to be more inclined to view Ward's argument more favorably due to her personal ties, as she currently worked at Louisville Metro and went to church with a potential trial witness. When called upon to supply its nondiscriminatory basis for striking Juror 4879, Louisville Metro explained that Juror 4879 was a "union employee and . . . union employees are not good for the [employers] . . . and plus, he also said . . . he had a problem previously with how he was treated at a - in buying a car, or looking at a car, and . . . I got a feeling that was going to affect his behavior in this case, but the main reason he was struck was because of a union." VR 7.10.18 4:12:50-4:13:40.

Ward responded that at least five other Caucasian members of the venire were union members, two of whom were current union workers. Ward posited that Louisville Metro's failure to strike any of the other five union members was "the very definition of a pretextual reason." VR 7.10.18 4:15:02-08. Ward pointed out that another Caucasian venire member who had not been stricken by Louisville Metro had also discussed experiences of discrimination.

The trial court found in favor of Louisville Metro with regard to Juror 4206. However, the trial court then determined Ward had carried her burden of proof and demonstrated that Louisville Metro's proffered reasons for exercising its peremptory strikes against Juror 4879 were pretextual. The trial court placed Juror 4879 back on the jury, finding that Louisville Metro's actual basis for the strike was a discriminatory motive. The court specifically

stated:

> I'm more concerned based on what has been presented. [Juror 4879] will be put back on the jury. I'm going to sustain the motion as it relates to [Juror 4879] because the burden of proof has been met initially. It, according to the second step, [Louisville Metro]'s put forth a race-neutral reason but the burden-shifting and the reasons - one of the ways that one can show pretext is to show that there are - in this instance - white members of the jury who were also union members and they were left on the jury. So that burden's been met.

VR 7.10.18 4:17:21-4:18:10. The trial court did not directly address Louisville Metro's additional reason for striking Juror 4879 - his prior experience of discrimination.

Following the trial court's ruling, Louisville Metro attempted to supplement its argument for striking Juror 4879, arguing that one of the Caucasian union members had more education than the African-American union worker, and "high education favors the defendant." VR 7.10.18 4:18:10-4:19:45. The court then rejected this alternative basis for the strike, stating that Louisville Metro had been required to supply its nondiscriminatory bases up front and could not put forth additional reasons now that the court had already ruled. The court stated that allowing a post hoc explanation, "would defeat the whole purpose of *Batson* to begin with, if you were allowed to put forth additional reasons after [the court] ruled." VR 7.10.18 4:18:50-4:19:01. It further remarked that if union membership was actually a legitimate criterion on which Louisville Metro decided, Louisville Metro should have

stricken some of the other union members from the panel.

After replacing Juror 4879 on the panel, the court reduced the jury further by random strike, and fifteen jurors, representing a jury of twelve and three alternates, were sworn in to hear the case. The court then decided that it could ultimately choose to insulate Juror 4879 from the final random drawdown of alternates, because if the reinstated juror could be randomly eliminated after a finding of intentional discrimination, "it would defeat the purpose for which *Batson* motions are made by eliminating a juror who was placed back on randomly." VR 7.10.18 4:19:55-4:21:21. Juror 4879 was, in effect, guaranteed a seat on the jury.

After three days of trial, Ward rested her case and Louisville Metro moved for a directed verdict on all counts. With regard to Ward's race discrimination claim, Louisville Metro argued that for Ward to prove pay discrimination, she had to provide proof of pay disparity between similarly situated African-American and Caucasian workers. Louisville Metro argued that Ward had not come forward with any evidence of Louisville Metro paying a similarly situated employee more. As for the retaliation claim, Louisville Metro's defense was three-fold: (1) that the counseling meeting was not an adverse action; (2) that Anderson did not know about Ward's complaint at the time of her separation and thus could not have retaliated against her; and (3) that Louisville Metro's refusal to accept rescission of a resignation is not an adverse action. Finally, Louisville Metro asserted that Ward had failed to state a cognizable due process claim based

on Louisville Metro's alleged failure to follow its resignation policy. The trial court granted a directed verdict in favor of Louisville Metro on the due process claim but denied its motions as related to the race discrimination and retaliation claims, finding that there was sufficient evidence presented by Ward for the jury to find in her favor on both claims.

As the trial court had previously indicated, Juror 4879 was not subjected to the random drawdown of alternates. The trial court reiterated its decision to protect Juror 4879 from the random draw of alternates as follows:

> That juror [4879] will be on the jury, on the 12-person deliberating jury. The other jurors are subject to elimination by random draw, and that juror's number . . . I'm pretty sure that that juror has been taken out and will remain out. That means he will be one of the twelve that go back to deliberate. The other fourteen are subject to elimination by random draw when the Madame Clerk comes out . . . . So we'll draw three, and those numbers will not go back with the twelve-person deliberating jury. But, yes, indeed, he's assured of being one of the numbers by the fact that he will not be in the box but three still need to be selected.

VR 7.16.18 1:00:38-1:01:46. After the drawdown eleven jurors plus Juror 4879 were left. These twelve jurors then retired to deliberate. They returned with two unanimous findings. First, the jurors found that Ward had experienced retaliation in violation of KRS[5] 344; second, they voted to award Ward $30, 030.80, the full amount of lost wages she claimed.

[5] Kentucky Revised Statutes

The jurors were divided on the remaining two issues. The jury rejected Ward's race discrimination claim 9-3. However, the jury also decided 9-3 to award Ward $850, 000.00 for mental and emotional distress. Neither Ward nor Louisville Metro polled the jury, leaving it unknown as to whether Juror 4879 voted with or against the majority of the panelists on any of the claims.

The trial court entered a final judgment of the jury's award of $880, 030.80 plus an additional $151, 508.10 for costs and fees on August 17, 2018. Louisville Metro filed a timely appeal on August 21, 2018, and Ward followed with her timely notice of conditional cross-appeal on August 31, 2018.

II. Analysis

A. Directed Verdict

We will first address Louisville Metro's argument concerning the trial court's failure to enter a directed verdict in its favor on all counts, as a reversal on this basis would obviate the need to consider the other arguments.

A motion for directed verdict "raises only questions of law as to whether there is any evidence to support a verdict." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968) (emphasis added). As such, if there is any "conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts." *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 215 (Ky. App. 2009). It is not the trial court's role to consider the credibility or weight of the proffered evidence. "[A] trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues

of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998) (citation and internal quotation marks omitted). This is a high burden to meet.

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Peters v. Wooten, 297 S.W.3d 55, 65 (Ky. App. 2009) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)).

Appellate review of the trial court's denial of a motion for directed verdict is not limited to evaluating the reasons proffered by the trial court for its denial. "Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous." *Brooks v. Lexington-Fayette Urban Cty. Housing. Auth.*, 132 S.W.3d 790, 798 (Ky. 2004).

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and

> the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990) (citations omitted).

KRS 344.280(1) makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person . . . because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]" A prima facie case of retaliation requires a plaintiff to demonstrate: (1) that the plaintiff engaged in a protected activity; (2) that protected activity was known by the employer; (3) that, thereafter, the employer took an adverse action against the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Brooks*, 132 S.W.3d at 803.

Louisville Metro contends that it was entitled to a directed verdict on Ward's retaliation claim because she failed to offer evidence that Louisville Metro took an adverse employment action against her or that there was any causal connection between any such action and her protected action of making a discrimination claim against Anderson. As to the

adverse employment action, there was some dispute regarding the effect a counseling session would have on Ward and whether the session she took part in would be recorded in her permanent file. Even if this were not sufficient to count as an adverse action, there remains the larger question of whether Ward resigned or was terminated. Ward contends that her verbal resignation was ineffective because she was told by Human Resources that resignations had to be in writing. As such, she contends that she was actually terminated. We believe Ward presented sufficient evidence from which a jury could conclude that she suffered some adverse employment action. As to the issue of causation, the jury was likewise presented conflicting facts regarding Anderson's knowledge of the complaint Ward filed and whether any such knowledge played into Anderson's action as related to Ward. Therefore, we must affirm the trial court's decision to deny Louisville Metro's motion for a directed verdict on the retaliation claim.

With respect to Ward's discrimination claim, Louisville Metro claims that it was entitled to a directed verdict because Ward failed to offer evidence that any similarly situated employees outside of her protected class were systematically treated better than she. To establish a prima facie case of discrimination, Ward must offer evidence demonstrating discrimination "against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race[.]" KRS 344.040(1)(a). Absent direct evidence of discrimination, Kentucky recognizes the *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) burden-shifting formula

"as the procedural framework within which to evaluate the merits of a discrimination claim," which "allows a plaintiff . . . to establish her case through 'inferential and circumstantial proof' when direct evidence of discrimination 'is hard to come by[.]'" *Overly v. Morehead State University*, No. 2013-CA-002008-MR, 2015 WL 7422820, at *5 (Ky. App. Nov. 20, 2015) (citing *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495-96 (Ky. 2005) (other citation omitted)). On this claim, we also agree with the trial court. Ward did present some circumstantial evidence to support her discrimination claim with respect to the advocacy and raises given to other employees during the relevant time period. The trial court did not err in allowing this claim to go to the jury.

B. Batson Challenge

"The use of peremptory challenges to remove jurors from the venire on the basis of race or gender violates the Equal Protection Clause of the Constitution." *Ross v. Commonwealth*, 455 S.W.3d 899, 906 (Ky. 2015) (citations omitted). The United States Supreme Court outlined the three-step process for evaluating equal protection challenges to jury selection practices in its 1986 decision, *Batson v. Kentucky*. *Id*.

> First, the [challenging party] must make a prima facie showing that the [other party] has exercised peremptory challenges on the basis of race. . . . Second, if the requisite showing has been made, the burden shifts to the [other party] to articulate a race-neutral explanation for striking the jurors in question. . . . Finally, the trial court must

> determine whether the [challenging party] has carried his burden of proving purposeful discrimination.

Commonwealth v. Snodgrass, 831 S.W.2d 176, 178 (Ky. 1992) (citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1722-24).

The trial court's "ultimate decision on a *Batson* challenge is akin to a finding of fact[.]" *Roe v. Commonwealth*, 493 S.W.3d 814, 827 (Ky. 2015) (citation omitted). "Because the trial court is the best 'judge' of [a party's] motives in exercising its peremptory strikes, great deference is given to the court's ruling." *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006) (citing *Wells v. Commonwealth*, 892 S.W.2d 299, 303 (Ky. 1995)). This "'[d]eference,' of course, does not mean that the appellate court is powerless to provide independent review[.]" *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757 (Ky. 2009) (citations omitted).

On review, a trial court's ruling regarding *Batson* challenges will not be disturbed absent clear error, i.e., when it is not supported by substantial evidence. *Washington v. Commonwealth*, 34 S.W.3d 376, 379-80 (Ky. 2000).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the

> opportunity of the trial court to judge [] credibility . . . ."

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (citations omitted).

The trial court acknowledged Louisville Metro struck two of the three African-American venire members who remained following strikes for cause and the trial court's own random draws. However, "*Batson* requires more than a simple numerical calculation[,]" so the challenging party must "establish as complete a record of the circumstances as is feasible [and] show a strong likelihood that such persons are being challenged because of their group association rather than because of a specific bias." *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989) (citations omitted).

Initially, Ward called the trial court's attention to Juror 4879's lack of any "particular animus or bias," and noted that his only brief mention of race pertained to how he preferred to describe his own race. VR 7.10.18 4:10:48-4:13:35. Ward accompanied this explanation with the fact that Louisville Metro exercised two of its preemptory challenges to remove two of three remaining African-Americans on the pool. Having reviewed the record, we agree with Ward that the trial court acted within its discretion in finding that Ward met her burden of establishing a prima facie *Batson* violation.

Turning then to the second step of the inquiry, the trial court asked Louisville Metro to provide its "race-neutral explanation for striking a juror of a protected class." *Roe*, 493 S.W.3d at 827 (citation omitted). "Unless a discriminatory intent is inherent

in the [challenged party's] explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). However, our Supreme Court has also cautioned that "'[w]hile the reasons need not rise to the level justifying a challenge for cause,' self-serving explanations based on intuition or disclaimers of discriminatory motive" are insufficient. Washington, 34 S.W.3d at 379 (quoting *Stanford v. Commonwealth*, 793 S.W.2d 112, 114 (Ky. 1990)).

Louisville Metro then gave its two race-neutral reasons for using a peremptory strike against Juror 4879: (1) his union membership; and (2) his past experience of discrimination. Louisville Metro argued that these two characteristics would make it more likely that Juror 4879 would be sympathetic toward Ward's position and stated, "I got the feeling that was going to affect his behavior in this case, but the main reason he was struck was because of a union." VR 7.10.18 4:13:28-35. Ward countered, pointing out that Louisville Metro failed to strike any of the other five white union members or the white juror with prior experience of discrimination.

Under the final step of *Batson*, "the trial court must assess the plausibility of the [challenged party's] explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class." *McPherson v. Commonwealth*, 171 S.W.3d 1, 3 (Ky. 2005) (citation omitted). The critical question at this stage is how credible the challenged party's justification is for his peremptory strike, as "implausible or fantastic

justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003) (citation omitted).

> "[W]hen illegitimate grounds like race are in issue, a [party] simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dretke, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332, 162 L.Ed.2d 196 (2005).

The credibility of the challenged party's reasons may be measured by "how reasonable, or how improbable, the explanations are[,] and by whether the proffered rationale has some basis in accepted trial strategy." *Cockrell*, 537 U.S. at 339, 123 S.Ct. at 1040. The trial court must consider "all relevant evidence," including the pattern of exercising strikes from the venire based on race or gender and the nature of the questions posed on voir dire. See *Johnson v. Commonwealth*, 450 S.W.3d 696, 706 (Ky. 2014), abrogated on other grounds *by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015); *Hardy*, 775 S.W.2d at 920.

The trial court considered Louisville Metro's and Ward's explanations in turn, evaluating the credibility of the proffered reasons for purposeful discrimination. The trial court found Louisville Metro's reasons to be pretext for purposeful

discrimination, explaining, "[O]ne of the ways that one can show pretext is to show that there are - in this instance - white members of the jury who were also union members and they were left on the jury. So that burden's been met." VR 7.10.18 4:17:58-4:18:10. The trial court did not directly address Louisville Metro's additional reason for striking Juror 4879 - his prior experience of discrimination. Ultimately, however, we find no clear error in the trial court's evaluation, and so we defer to the trial court's fact-finding ability.

Certainly, the statements Louisville Metro gave after the trial court rendered its judgment on the matter suggest that counsel was floundering for an additional argument that might lend credence to its earlier proffered explanations. The Supreme Court has previously commented that race-neutral reasons added after the fact "reek[] of afterthought" and should therefore be disregarded. *Dretke*, 545 U.S. at 246, 125 S.Ct. at 2328. It is for this very reason that we disregard Louisville Metro's additional clarification regarding the comparative education levels of the other venire members belonging to unions.

Both the United States and the Kentucky Constitutions establish and recognize the right to a completely impartial jury. *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013) (citing *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008)). "Those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 86-87, 106 S.Ct. at 1717-18

(citations omitted). The right to a completely impartial jury does not entitle parties to a jury of any particular composition. *Commonwealth v. Doss*, 510 S.W.3d 830, 835 (Ky. 2016).

> The right to an impartial jury, however, does not afford a litigant the right to a jury that includes one or more members of his or her ethnic or racial background, religious creed, gender, profession, or other personal characteristic by which one is identified. The impossibility of constructing a jury of 12 persons that "insure[s] representation of every distinct voice in the community" is obvious and well recognized.

Id. (citing *Williams v. Florida*, 399 U.S. 78, 102, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)). The only point at which parties are entitled to a fair cross-section of the community is when the jurors assemble in the jury pool on the first day of jury service. *Commonwealth v. Stevens*, 489 S.W.3d 755, 763 (Ky. App. 2016); *Stanford v. Commonwealth*, 734 S.W.2d 781, 785 (Ky. 1987) (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967)).

In the eyes of the Supreme Court of Kentucky, random selection is one of the most effective tools for avoiding the effects of both overt and subconscious bias and ensuring trial by an impartial jury. *Doss*, 510 S.W.3d at 836. Randomness is embedded at multiple stages of jury selection - selection of the *voir dire* panel, random draws excusing excess venire members, and the additional random draw of alternates at the close of proof. CR[6] 47.02, 47.03. Randomness ensures that "at no time at all, will

[6] Kentucky Rules of Civil Procedure.

anyone involved be able to know in advance, or manipulate, the list of names who will eventually compose the empaneled jury." *Hayes v. Commonwealth*, 320 S.W.3d 93, 99 (Ky. 2010) (quoting *Williams v. Commonwealth*, 734 S.W.2d 810, 812 (Ky. App. 1987)).

Although federal civil proceedings have done away with the practice of seating alternate jurors in civil trials, Kentucky trial courts continue to permit the practice in combination with a final random jury selection. After an enlarged jury panel hears a case through closing, the jurors' names are put in the box from which the panel is drawn at random, and a fair cross-section can no longer be guaranteed. CR 47.02.

Ward argues that designating a specific juror for the final panel above the other jurors is within the trial court's discretion as an appropriate remedy for a *Batson* violation. In doing so, she attempts to draw a parallel between *Hubbard v. Commonwealth* and the present case. *Hubbard v. Commonwealth*, 932 S.W.2d 381, 382 (Ky. App. 1996). In that case, the trial court dismissed one of thirteen jurors impaneled when she revealed to the court after the conclusion of evidence that her religious convictions prevented her from judging any person guilty. *Id*. The trial judge was forced to reconsider the appropriateness of her serving on the jury and decided to dismiss the juror, bypassing the final random drawdown. Id. This Court affirmed that decision, stating that "[t]he trial court's dismissal of the juror by designating her as the alternate did not interfere with the randomness of the jury selection process." *Id*. at 383 (citing *George v. Commonwealth*, 885 S.W.2d 938, 941 (Ky. 1994)).

The distinction between Hubbard and the present appeal lies in the difference between preserving the impartiality of the jury and preserving the makeup of the jury. The Hubbard court removed an unsuitable juror from the drawdown because she would be unable to render a fair and impartial verdict, whereas the trial court in Ward's case guaranteed one juror a spot on the deciding panel while other suitable jurors were still subject to random drawdown. See id. The trial court did not act to preserve the impartiality of the jury but rather to preserve what it deemed to be a fair cross-section of the community, a practice previously condemned by the Supreme Court of Kentucky. Doss, 510 S.W.3d at 836 ("No one would reasonably argue that a judge could properly strike a qualified individual juror from the petit jury panel simply to make room for a different juror of another race or ethnicity.").

It is true that trial courts are granted wide latitude in rectifying *Batson* violations. *Batson*, 476 U.S. at 99 n.24, 106 S.Ct. at 1725 n.24. However, when remedying such a violation, a trial court must always strive to maintain impartiality among the jury. The Supreme Court suggested two remedies for *Batson* violations while considering the preservation of random impartiality, although it declined to provide any definite list of solutions. *Id*. According to the Supreme Court, "whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection

with the improperly challenged jurors reinstated on the venire" depends entirely on the particular case before the trial court. *Id*. (citations omitted).

As Ward points out in her brief, Kentucky courts are not required by CR 47.02 to use alternate jurors. They may impanel exactly as many jurors as will serve on the panel. However, the rule explicitly provides that where there are more members on the jury than "exceeds the number required by law," all jurors will be subject to random drawdown. Ward's comparison between Federal Rule of Civil Procedure 47, which abstains from the practice of seating alternate jurors, and CR 47.02, which allows for alternate jurors and explicitly provides for the procedure by which they are eventually trimmed from the deciding jury, is simply inapposite. If the court had not been using alternate jurors, guaranteeing Juror 4879 a seat on the jury would have been unquestionably appropriate as one of the remedies explicitly provided by the *Batson* court.

In the absence of beginning with an entire new panel, the trial court had the remedy of simply placing Juror 4879 back on the jury.[7] Once back on the panel, the juror would have the same opportunity to serve on the deliberating jury as the other fourteen empaneled jurors through the random drawdown process. This is not what happened. Instead, the trial court crafted an

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[7] Ward further contends that Louisville Metro ought to be penalized for its *Batson* violation. Louisville Metro essentially forfeited its peremptory strike when Juror 4879 was placed back on the jury. That, in and of itself, is a method of penalizing an impermissive use of peremptory challenges.

overbroad remedy that went beyond *Batson*'s purpose of treating all jurors equally. The trial court's remedy insulated Juror 4879 from the drawdown. Its remedy for the *Batson* violation was to ensure Juror 4879 was treated differently from the other panel members by guaranteeing that juror the right to serve on the deliberating jury without having to first go through the drawdown process required of the other panel members.

Had there been no *Batson* violation, the full random drawdown might still have completely stripped the jury of non-white members, a possibility our Court has previously recognized as constitutional. *Stevens*, 489 S.W.3d at 763-64 ("Until our Supreme Court says otherwise, the law requires that the pool from which a jury panel is selected represent a fair cross-section; however, it does not require that the jury panel itself accurately reflect the community."). Placing Juror 4879 back on the jury subject to random drawdown restored Juror 4879 to the exact position he would have been in had there been no *Batson* violation. The trial court's further actions of guaranteeing Juror 4879 a spot on the final jury acted as proverbial belt and suspenders to ensure what the court saw as a fair cross-section of the community, a result that might not have come to fruition had the court respected the practice of final drawdown.

By bypassing the random selection process mandated by CR 47.02 when dealing with alternate jurors, the trial court exceeded its discretion in fashioning a remedy for a *Batson* challenge. Having determined that the trial court erred, we must next decide whether Louisville Metro is required to show

that the error actually prejudiced this case. We do not believe a showing of actual prejudice is required in this instance. As a matter of practicality, this would be exceedingly difficult. There is no way to know whether Juror 4879 would have been excluded through the drawdown process. Likewise, there is no way to be certain how his presence affected the jury's deliberations and ultimate verdict. What is certain is that the trial court's actions interfered with the randomness and equality of treatment our rules and caselaw require in jury selection.

> On reflection as to how disparate procedures for jury selection might affect our whole system of justice, we have decided that it is in the interest of justice that the statutes and rules for jury selection be closely followed, and that no substantial deviation be allowed, regardless of prejudice. The matter of jury selection is too important a part of our judicial system to permit variations, from one court to another, in compliance with controlling statutes.

Allen v. Commonwealth, 596 S.W.2d 21, 22 (Ky. App. 1979).

Accordingly, we must presume the trial court's error was prejudicial, vacate the jury's entire verdict, and remand this case for a new trial on the counts submitted to the jury for decision. While this conclusion renders the remaining arguments moot, we will briefly address the evidentiary issue related to exclusion of Louisville Metro's statements regarding its resignation policy because this issue is likely to arise on retrial.

C. Louisville Metro's Resignation Policy

On cross-appeal, Ward asserts that the trial court erred in excluding documents, which include Louisville Metro's resignation policy and its responses to her unemployment claim with respect to those policies. She argues that these documents are permissive as party-opponent statements demonstrating that Louisville Metro knew that its resignation policy had not been complied with by Louisville Metro agents following Ward's separation.

Under KRE[8] 801A(b)(1), "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity[.]" According to Ward, these documents function as an admission by Louisville Metro about the operation of its policies and show Louisville Metro's knowledge that its rules had been broken.

Louisville Metro counters, stating that Ward's argument that these documents constitute an admission against interest is factually and legally incorrect because Louisville Metro's policy was permissive with respect to written notice. Furthermore, Louisville Metro posits that the policy does not establish written notice to be the sole trigger of an employee's resignation. Louisville Metro adds that in addition to being inadmissible hearsay, the documents posed significant risk of confusing the jury and inviting a verdict based on

[8] Kentucky Rules of Evidence.

speculation.

We believe the documents are relevant and that their probative nature outweighs any undue prejudice. One of the central issues in this case was whether Ward's verbal resignation was effective or whether she was terminated. After the meeting, Ward contends that she was advised by Human Resources that a verbal resignation alone was not effective and that she could change her mind by not completing the process. According to Ward, she elected not to follow through on her verbal resignation meaning that she was terminated as opposed to having voluntarily resigned. We believe Louisville Metro's policies and its statements related thereto are relevant to this issue. We believe the jury is capable of understanding the policies and Louisville Metro's statements concerning them without becoming unduly confused. They should be admitted subject to appropriate objections during any retrial of this matter.

III. Conclusion

In light of the foregoing, we affirm in part, vacate the jury's judgment in its entirety, and remand for further proceedings in accordance with this opinion.

ALL CONCUR.

APPENDIX C
Judgment of the Jefferson Circuit Court
[Filed July 23, 2018]

NO. 16-CI-000330 JEFFERSON CIRCUIT COURT
DIVISION SIX
JUDGE OLU STEVENS

MARYSUSAN WARD PLAINTIFF

vs. **ENTRY OF JUDGMENT**

LOUISVILLE METRO GOVERNMENT DEFENDANT

This action came before the Court for a trial by jury on July 10, 2018 and concluded on July 16, 2018.

APPEARING

The attorneys appearding for the parties are named as follows:

1. For the Plaintiff: Robyn Smith, Soba Saiyed, and Kelly Perry; and
2. For the Defendant: J. Denis Ogburn

JURY VERDICT

The jury found for Plaintiff on her claim of retailiation in violation of KRS Chapter 344, the Kentucky Civil Rights Act, and awarded damages as follws:

1. Lost Wages: $30,030.80; and
2. Embarassment, Humiliation, and Mental and Emotional Distress: $850,000.00.

ENTRY OF JUDGMENT

WHEREBY, the jury having rendered its verdict, and this Court being otherwise sufficiently advised, JUDGMENT is entered in favor of the Plaintiff, MarySusan Ward, against the Defendant, Louisville Metro Government, in the amount of $880,030.80. Pursuant to CR 52.02, the parties shall have ten days following the entry of this Judgment to move the Court for an amendment hereto, including any motion for attorney's fees and costs under KRS 344.450 and JRP 404, or any other motion for amendment or relief permitted under the Kentucky Revised Statutes and the Kentucky Rules of Civil Procedure. If no such motion is made within the time specified above, this Judgment shall become final and appealable.

Date: 7/23/18 /s Olu Stevens
HON. OLU STEVENS,
Jefferson Circuit Judge, Div. Six

Tendered by:

/s Robyn Smith
Robyn Smith
Soba Saiyed
Kelly Perry
P. Stewart Abney
Abney Law Office, PLLC
624 West Main Street, Fifth Floor
Louisville, KY 40202

APPENDIX D
KY. R. CIV. P. 47.02

Kentucky Rules of Civil Procedure (CR) Rule 47.02

CR 47.02 Alternate jurors

At any time before either side has exercised a peremptory challenge or challenges, but not thereafter, the court may direct the clerk to draw from the jury box, in addition to the number of jurors required by law to comprise the jury, one (1) or two (2) cards bearing numbers identifying prospective jurors. All jurors so drawn shall be empaneled and shall hear the case. Should it become necessary for any reason to excuse a juror, the trial shall continue unless the number of jurors be reduced below the number required by law. If the membership of the jury exceeds the number required by law, immediately before the jury retires to consider its verdict the clerk, in open court, shall place in a box the cards bearing numbers identifying the jurors empaneled to hear the case and, after thoroughly mixing them, withdraw from the box at random a sufficient number of cards (one or two, as the case may be) to reduce the jury to the number required by law, whereupon the jurors so selected for elimination shall be excused.

Credits

HISTORY: Amended eff. 1-1-80; prior amendment eff. 10-1-71; adopted eff. 7-1-53

Rules Civ. Proc., Rule 47.02, KY ST RCP Rule 47.02
Current with amendments received through November 1, 2020.